

FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers)	WT Docket No. 05-265
)	
Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services)	WT Docket No. <u>00-193</u>

MEMORANDUM OPINION & ORDER AND NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioners Copps and Adelstein issuing separate statements.

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I. INTRODUCTION

1. In this Memorandum Opinion and Order and Notice of Proposed Rulemaking, we terminate the open proceeding relating to the automatic and manual roaming obligations of Commercial Mobile Radio Services (CMRS) providers in WT Docket No. 00-193,¹ and initiate a new proceeding to examine whether our current rules regarding roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market. In the Memorandum Opinion and Order portion of this decision, we terminate the previous consideration of roaming issues in WT Docket No. 00-193, primarily on the basis that the comments filed and the matters at issue therein are now stale due to the passage of time and other regulatory and industry changes that have occurred since its commencement. As a result, we decide to terminate the proceeding without the adoption of rules. We nonetheless decide to initiate a Notice of Proposed Rulemaking in a new proceeding to examine CMRS roaming in a manner that takes into account current technological and market conditions. Our decision today will allow us to develop a record with up-to-date information regarding the state of today's CMRS marketplace in an effort to determine whether there is a need for a regulatory regime for roaming services.

II. BACKGROUND

2. "Roaming" occurs when the subscriber of one CMRS provider utilizes the facilities of another CMRS provider with which the subscriber has no direct pre-existing service or financial relationship to place an outgoing call, to receive an incoming call, or to continue an in-progress call.² Typically, although not always, roaming occurs when a subscriber places or receives a call while physically located outside of the service area of its "home" CMRS provider. The basic technical requirement for roaming, whether done manually or automatically, is that the subscriber has a handset that is capable of accessing the roamed-on (host) system.³ The Commission previously has determined that roaming is a common carrier service and that CMRS providers are subject to the common carrier provisions of Title II of the Act.⁴ Therefore, complaints and enforcement actions involving unjust and unreasonable charges, practices, or discriminatory conduct by CMRS carriers in the provision of roaming services are covered by the complaint process set forth in Title II of the Act.⁵

¹ See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, 15 FCC Rcd 21628 (2000) ("2000 CMRS Roaming NPRM").

² See 2000 CMRS Roaming NPRM, 15 FCC Rcd at 21629 ¶ 2; Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9464 ¶ 3 (1996) ("Interconnection and Resale Obligations Second Report and Order" and "Interconnection and Resale Obligations Third NPRM," respectively). Section 22.99 of the Commission's rules describes a "roamer" as "[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber." 47 C.F.R. § 22.99.

³ See 2000 CMRS Roaming NPRM, 15 FCC Rcd at 21629 ¶ 2; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9466 ¶ 7.

⁴ See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463-71 ¶¶ 1-14. See also 47 C.F.R. § 20.15. Section 332(c)(1) of the Act provides that a person engaged in the provision of a service that is a commercial mobile service shall be treated as a common carrier for purposes of the Act. See 47 U.S.C. § 332(c)(1).

⁵ Under Section 201(a) of the Act, common carriers must provide service "upon reasonable request," and the Commission has authority to order interconnection among carriers. See 47 U.S.C. § 201(a). Section 201(b) requires that all charges, practices, classifications, and regulations for common carrier service be just and reasonable and provides that any charge, practice, classification, and regulation that is unjust and unreasonable is unlawful. See 47 U.S.C. § 201(b). Section 202(a) prohibits unjust or unreasonable discrimination in charges, practices, classifications, and services by common carriers in connection with any "like" communications service and also

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3. There are two forms of roaming -- manual and automatic. With manual roaming, the most rudimentary form of roaming, the subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call.⁶ Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service.⁷ By contrast, with automatic roaming, the roaming subscriber is able to originate or terminate a call without taking any special actions.⁸ Automatic roaming requires a pre-existing contractual agreement between the home and the roamed-on host system.⁹

A. Regulatory Actions Pertaining to CMRS Roaming Obligations

4. *Manual Roaming Requirements.* The Commission first adopted manual roaming requirements in 1981 as part of the original cellular service rules.¹⁰ Prior to 1996, only cellular carriers were required to offer manual roaming under the Commission's rules.¹¹ In 1996, in the *Interconnection and Resale Obligations Second Report and Order*, the Commission extended the manual roaming rule to include other CMRS providers in the Broadband Personal Communications Service (PCS) and Specialized Mobile Radio Service (SMR) that offer competitive telephony services comparable to cellular service, so long as the roamer's handset is technically capable of accessing their systems.¹²

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prohibits undue or unreasonable preferences or advantages. See 47 U.S.C. § 202(a). Section 208 provides that complaints may be filed with the Commission against common carriers subject to the Act. See 47 U.S.C. § 208.

⁶ In this connection, manual roaming is the only form of roaming that is available when there is no pre-existing contractual relationship between a subscriber, or her home system, and the system on which she wants to roam.

⁷ *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465 ¶ 5. We are aware of at least two ways manual roaming is conducted. In its simplest form, a host system uses information sent by the roaming mobile unit during call setup to determine whether the unit is a subscriber in the market and, if not, routes the call to a third party for operator assistance, payment arrangements, and completing the call. In a more complex form, the host system uses the information to identify the unit's home carrier and determine whether that carrier has a roaming agreement in place with the host carrier. If no agreement exists, the host carrier routes the call to a third party as described above. In both cases, roaming can only occur if the unit is technologically compatible with the host system.

⁸ This form of roaming is sometimes referred to as "seamless" roaming. However, some parties understand "seamless" roaming to include handoff of calls in progress as one moves from the service area of one provider to another. For the sake of clarity, we use the term "automatic" roaming to refer to origination and termination of calls without the need for any special facilitating action by the subscriber.

⁹ Before a subscriber can complete an originating call under an automatic roaming arrangement, the host system first identifies the subscriber's home carrier by means of the subscriber's Mobile Identification Number, verifies that it has an automatic roaming arrangement with that carrier, and queries the home carrier to verify that the subscriber's account is current (and in some instances to obtain information about the subscriber, such as his or her preferred service features). See *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21629-30 ¶ 4; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465-66 ¶ 6.

¹⁰ See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, CC Docket No. 79-318, *Report and Order*, 86 FCC 2d 469 (1981) (adopting requirement in then Section 22.911(b) of the Commission's rules that base stations render service to properly licensed roamers).

¹¹ See 47 C.F.R. § 22.901 (1995); 47 C.F.R. § 22.911(b) (1981).

¹² See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9471 ¶ 13; 47 C.F.R. § 20.12. Section 20.12(c) provides as follows: "Roaming. Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area

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5. The Commission's decision to extend the manual roaming rule to other CMRS services was premised on its determination that the availability of roaming on broadband wireless networks was important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications. Further, the Commission was concerned that while these systems were being built, market forces alone might not be sufficient to cause roaming services to become widely available.¹³ In addition, the Commission stated that roaming capability may be a key competitive consideration in the wireless market and that new entrants may be at a competitive disadvantage with respect to incumbent wireless carriers if their subscribers have no ability to roam on other networks.¹⁴ The Commission further determined to extend the rule "in order to ensure regulatory parity and to promote competition in the wireless market by enhancing all such carriers' abilities to compete."¹⁵

6. In the 1996 *Interconnection and Resale Obligations Third NPRM*, the Commission sought additional comment on both automatic and manual roaming obligations. In particular, it asked whether any rule governing covered providers' obligations to provide automatic roaming services should be adopted. The Commission tentatively concluded that the market might render any automatic roaming requirements unnecessary five years after the last group of initial broadband PCS licenses was awarded. In this regard, the Commission asked whether any roaming rule, manual or automatic, should sunset at that time.¹⁶

7. In July 2000, the Commission addressed reconsideration petitions regarding the manual roaming requirement.¹⁷ Although the Commission generally affirmed the manual roaming requirement, it modified the definition of CMRS providers to which the rule applied, including extending the rule to cover certain CMRS data as well as voice providers. As a result, the manual roaming requirement currently applies to all cellular, broadband PCS, and SMR providers that offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.¹⁸ In that same order, in addition to resolving pending reconsideration petitions, the Commission terminated consideration of the roaming issues raised in the *Interconnection and Resale Obligations Third NPRM* because changes in the market and technology had rendered the record stale.

8. *2000 CMRS Roaming NPRM*. In October 2000, the Commission initiated a new proceeding (in WT Docket No. 00-193) and adopted the *2000 CMRS Roaming NPRM* to establish a vehicle by which roaming issues could be reexamined. In the *2000 CMRS Roaming NPRM*, the Commission affirmed the *Interconnection and Resale Obligations Second Report and Order's* conclusion

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where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations."

¹³ *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 ¶ 2, 9468-70 ¶¶ 10-11.

¹⁴ *Id.* at 9469-70 ¶ 11.

¹⁵ *Id.* at 9471 ¶ 13.

¹⁶ *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9479 ¶ 32. The last group of initial licenses for broadband PCS spectrum was awarded on November 24, 1997. Thus, the hypothetical sunset date discussed in the *Interconnection and Resale Obligations Third NPRM* would have fallen on November 24, 2002. See *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21631 n.15.

¹⁷ See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 15975, 15979-81 ¶¶ 13-19 (2000) ("Manual Roaming Order on Reconsideration").

¹⁸ See *id.* at 15981-83 ¶¶ 18, 22-24.

that ubiquitous roaming on CMRS systems is important to the development of a seamless, nationwide "network of networks."¹⁹ However, the Commission stated that to the extent competition in the CMRS market has eliminated the means or economic incentives for certain CMRS providers to discriminate unreasonably in the provision of roaming, or otherwise to engage in unjust or unreasonable practices, the imposition of a roaming requirement would not be in the public interest. Thus, the Commission stated, it may be in the public interest to impose a roaming requirement "[o]nly where market forces alone are not sufficient to ensure the widespread availability of competitive roaming services, and where roaming is technically feasible without imposing unreasonable costs on CMRS providers."²⁰

9. The 2000 CMRS Roaming NPRM sought comment on whether any roaming rule, manual and/or automatic, should be sunset. The Commission renewed the *Interconnection and Resale Obligations Third NPRM's* tentative conclusion that any roaming rule should apply only for a transitional period, *i.e.*, until five years after the last group of initial licenses was issued for broadband PCS spectrum. This was based on the belief that once broadband PCS providers' build-out periods were completed, there would likely be sufficient wireless capacity available to render a manual or automatic roaming rule unnecessary.²¹ The 2000 CMRS Roaming NPRM also inquired whether any sunset of the manual roaming rule should be contingent upon adoption of an automatic roaming rule.²²

10. The record in response to the 2000 CMRS Roaming NPRM closed in February 2001. The Commission received numerous comments and reply comments, as well as a number of *ex parte* presentations from interested parties. In November 2004, the Rural Telecommunications Group, Inc. (RTG) filed a Petition for Commission Action requesting that the Commission, either on its own motion or pursuant to its petition, refresh the record in this proceeding.²³ More recently, RTG gave an *ex parte* presentation in which it requested that the Commission mandate automatic roaming at just and reasonable rates in order to assure seamless communications for customers throughout the United States.²⁴ In addition, Leap Wireless International, Inc. has made *ex parte* presentations requesting that the Commission review how roaming issues are affecting small wireless carriers.²⁵

B. Current State of the CMRS Marketplace

11. *Recent Industry Developments.* Since the closing of the record in response to the 2000 CMRS Roaming NPRM, the CMRS market has undergone significant growth and transformation. During 2003, the mobile telephony sector showed significant growth, with mobile data services beginning to make a significant contribution to that growth. In the 12 months ending December 2003, the mobile telephony sector generated over \$87 billion in revenues,²⁶ increased subscribership from 141.8 million to

¹⁹ 2000 CMRS Roaming NPRM, 15 FCC Rcd at 21634 ¶ 15 (citing *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9467 ¶ 8).

²⁰ *Id.* at 21635 ¶ 16.

²¹ *Id.* at 21639 ¶ 32, citing *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9479 ¶ 32. See also 2000 CMRS Roaming NPRM, 15 FCC Rcd at 21642, app. (Initial Regulatory Flexibility Analysis).

²² *Id.* at 21639 ¶ 32.

²³ See Petition for Commission Action of the Rural Telecommunications Group, Inc. (RTG), WT Docket No. 00-193, filed Nov. 1, 2004 ("RTG Petition").

²⁴ See RTG, WT Docket No. 00-193, *Ex Parte*, filed June 28, 2005.

²⁵ Leap Wireless International, Inc. (Leap Wireless), WT Docket No. 00-193, *Ex Parte*, filed July 12, 2005; See also Leap Wireless *Ex Parte*, filed August 17, 2005.

²⁶ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 04-111,

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160.6 million,²⁷ and produced a nationwide penetration rate of roughly 54 percent.²⁸ Mobile data services continued to grow in popularity, with data constituting from 2 to 5 percent of the revenues of some mobile operators.²⁹ Average revenue per minute of use, a proxy for the pricing of mobile voice services, declined by 13 percent to \$0.10.³⁰

12. In conjunction with the growth of the CMRS industry, a number of competing national, regional, and local network operators have emerged, and U.S. consumers have continued to benefit from competition in the CMRS marketplace. In September 2004, 276 million people, or 97 percent of the total U.S. population, lived in counties with access to three or more different operators (cellular, broadband PCS, and/or digital SMR providers) offering mobile telephone service.³¹ Almost 250 million people, or 88 percent of the U.S. population, lived in counties with five or more mobile telephone operators competing to offer service.³² The resulting competitive pressure has led mobile telephone carriers to upgrade their networks with next generation technologies that allow them to offer mobile data services at higher data transfer speeds.³³ Both small and large carriers are developing and implementing new “2.5G and 3G” digital technologies and networks to accommodate new applications.³⁴ Mobile telephony carriers have also continued to expand their geographic coverage through the Commission’s spectrum auctions or earlier licensing procedures, and through various types of transactions, including mergers and acquisitions, joint ventures, contractual affiliations with smaller carriers, and spectrum sales and swaps.³⁵

13. *Roaming Issues Raised in Recent Merger Transactions.* Although the record in the 2000 CMRS Roaming proceeding has been closed since 2001, roaming has emerged as an issue in several proceedings in the last year dealing with wireless mergers. In October 2004, as part of its review and consideration of the AT&T Wireless/Cingular merger, the Commission examined the state of the mobile telephony marketplace, and specifically addressed roaming issues that had been raised in the record of that proceeding.³⁶ The Commission concluded that the proposed merger would not adversely affect the availability of roaming services or raise roaming rates passed through to customers.³⁷ The Commission found that the provision of automatic roaming services had become increasingly competitive over time, and that the continued presence of two nationwide and numerous regional carriers using Global System

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Ninth Report, 19 FCC Rcd 20597, 20691, Appendix A, Table 1, at A-2 (2004) (“*Ninth Annual CMRS Competition Report*”).

²⁷ See *id.* at 20668 ¶ 174.

²⁸ *Id.*

²⁹ See *id.* at 20660 ¶ 155.

³⁰ See *id.* at 20700, at Appendix A, Table 9, at A-11.

³¹ See *id.* at 20700, Appendix A, Table 10, at A-11.

³² See *id.* at 20698, Appendix A, Table 5, at A-9.

³³ See *id.* at 20650-53 ¶¶ 130-35.

³⁴ See paras. 44-47, *infra*.

³⁵ See *Ninth Annual CMRS Competition Report*, 19 FCC Rcd at 20622-30 ¶¶ 64-79.

³⁶ Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522 (2004) (“*Cingular-AT&T Wireless Order*”).

³⁷ *Id.* at 21588 ¶ 173.

for Mobile Communications (“GSM”) technology after the merger should be sufficient to ensure the continued availability of roaming services at competitive rates to Cingular’s potential roaming partners.³⁸

14. The ALLTEL Corporation (ALLTEL)-Western Wireless Corporation (Western Wireless) merger and the Sprint-Nextel merger have again led some parties to raise competitive concerns regarding roaming. A number of smaller carriers asserted that the proposed mergers would be detrimental to roaming. In the ALLTEL-Western Wireless proceeding, Lamar County Cellular (Lamar) and Rural Telecommunications Group, Inc. (RTG) asserted that the merger should be denied because it would create the opportunity for ALLTEL to engage in anticompetitive roaming practices.³⁹ They noted that roaming arrangements can only be made with a technologically compatible network, and that the proposed merger would result in a two-to-one reduction in analog carriers in many markets, leaving analog-only carriers with only one possible roaming partner in those areas.⁴⁰ They suggested that this sort of market consolidation may lead larger carriers to favor each other with “sweetheart” roaming deals or to charge higher premiums for costumers of small rural carriers to roam on their networks.⁴¹ They further asserted that rural carriers may lose roaming coverage previously provided by Western Wireless if ALLTEL chooses not to honor existing Western Wireless roaming agreements, and that ALLTEL may further restrict roaming availability by not entering into any new agreements in the future.⁴² They noted that because small carriers have limited service areas, the availability of automatic roaming arrangements is crucial to their ability to compete.⁴³ United States Cellular Corporation expressed a similar concern that “national” sized-carriers such as the proposed merged entity could in the future refuse to sign roaming agreements with smaller carriers, and that the inability to obtain automatic roaming will put these smaller carriers out of business, reducing competitive pressures on the larger carriers even further.⁴⁴

15. In the Sprint-Nextel merger, a number of parties either requested that the Commission impose a condition requiring the merged entity to enter into roaming agreements,⁴⁵ or declare a national policy requiring large nationwide carriers to enter into reasonable, reciprocal, roaming agreements.⁴⁶ For

³⁸ *Id.* at 21590 ¶ 177.

³⁹ Petition to Deny of Lamar County Cellular, WT Docket No. 05-50, filed Mar. 9, 2005, at 8-9 (“Lamar Petition”); Comments in Opposition of Rural Telecommunications Group, Inc., WT Docket No. 05-50, filed Mar. 9, 2005, at 2, 8-9 (“RTG Comments in Opposition”).

⁴⁰ RTG Comments in Opposition, WT Docket No. 05-50, at 8-9.

⁴¹ Lamar Petition, WT Docket No. 05-50, at 9; RTG Comments in Opposition, WT Docket No. 05-50, at 9.

⁴² RTG Petition, WT Docket No. 05-50, at 9.

⁴³ Lamar Petition, WT Docket No. 05-50, at 9; RTG Comments in Opposition, WT Docket No. 05-50, at 8; *see also* Comments of United States Cellular Corporation, WT Docket No. 05-50, filed Mar. 9, 2005, at 3 (“USCC Comments”).

⁴⁴ USCC Comments, WT Docket No. 05-50, at 3.

⁴⁵ NY3G Partnership, a Multichannel Multipoint Distribution System (MMDS) licensee, filed a petition to deny in which it contended that, if the Commission otherwise found the proposed merger in the public interest, then the Commission should impose conditions on the merged entity that would require the merged entity to engage in good faith negotiations towards entering into automatic roaming agreements. NY3G Partnership Comments, WT Docket No. 05-63, filed Mar. 30, 2005, at 3. Also, NY3G Partnership appeared to argue that, if the Commission otherwise found the proposed merger in the public interest, the Commission should impose roaming conditions. *See id.* at 4.

⁴⁶ USCC and Rural Cellular Association (RCA) urged the Commission to use this merger review proceeding to adopt policies requiring large nationwide carriers to enter into reasonable, reciprocal, roaming agreements with small, mid-size, regional carriers. USCC Comments, WT Docket No. 05-63, filed Mar. 30, 2005, at 1-2, 5; RCA Comments, WT Docket No. 05-63, filed Mar. 30, 2005, at 2-5.

*example, SouthernLINC Wireless contended that a condition requiring the merged entity to enter into roaming agreements was necessary because it had been unable to negotiate a reasonable roaming agreement with Nextel or its affiliate, Nextel Partners, which Southern LINC stated were its only potential roaming partners.*⁴⁷ Although SouthernLINC Wireless reached an agreement with Nextel, SouthernLINC Wireless stated that the agreement restricted its subscribers to basic interconnected voice roaming and denied them access to push-to-talk digital dispatch roaming or data roaming services.⁴⁸

16. In approving the ALLTEL-Western Wireless and Sprint-Nextel merger proposals, we considered, as part of our review, the impact of these transactions on roaming.⁴⁹ In response to the concerns raised by parties regarding the current state of the roaming market in rural areas, we noted that the Commission's existing manual roaming rules address many of these concerns and offer possible avenues for relief.⁵⁰ Under the Commission's current manual roaming rule, other carriers are required to complete calls initiated by ALLTEL's and Sprint's customers where ALLTEL and Sprint cannot because it has neither its own signal nor an automatic agreement. In addition, to further ensure compliance, we adopted as a condition to our approval a reciprocal duty, *i.e.*, that ALLTEL and Sprint may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber.⁵¹ We also noted that if a roaming partner believes that ALLTEL or Sprint is charging unreasonable roaming rates, it can file a complaint with the Commission under Section 208 of the Communications Act.⁵² We recognized, however, that the manual roaming requirement and the ability to file a Section 208 complaint may not fully address the concerns raised by the commenters. Given the broad scope of the concerns raised -- many of which seem to call for a reevaluation of the Commission's roaming rules and policies -- we determined that it was more appropriate to address those concerns in the context of a rulemaking proceeding. We, therefore, stated that we would initiate a rulemaking proceeding in the near future that would consider the Commission's rules regarding the roaming requirements applicable to CMRS providers under current market conditions and developments in technology.⁵³

17. *Rural Markets.* In addition to issues raised in the merger proceedings, commenters have recently raised particular concerns regarding roaming in rural markets. For instance, in response to the Public Notice issued in WT Docket No. 05-71 concerning the *Tenth Annual CMRS Competition Report*, small and rural wireless service providers assert that the amount of roaming traffic they exchange with other carriers has been significantly reduced as the large carriers enter into roaming agreements with other larger carriers and avoid roaming on smaller carriers' networks.⁵⁴ They also assert that large, nationwide

⁴⁷ SouthernLINC Wireless Reply Comments, WT Docket No. 05-63, filed Apr. 18, 2005, at 5-6.

⁴⁸ *Id.* at 6.

⁴⁹ Application of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, FCC 05-138 at ¶¶ 99-109 (rel. July 19, 2005) ("*ALLTEL-WWC Order*"); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, FCC 05-148 (rel. Aug. 8, 2005) ("*Sprint-Nextel Order*").

⁵⁰ *ALLTEL-WWC Order* at ¶ 108; *Sprint-Nextel Order* at ¶ 127.

⁵¹ *ALLTEL-WWC Order* at ¶ 108; *Sprint-Nextel Order* at ¶ 127.

⁵² *ALLTEL-WWC Order* at ¶ 108; *Sprint-Nextel Order* at ¶ 127.

⁵³ *ALLTEL-WWC Order* at ¶ 109; *Sprint-Nextel Order* at ¶ 128.

⁵⁴ See WT Docket No. 05-71 (*Tenth Annual CMRS Competition Report*): Leaco Rural Telephone Cooperative, Inc. Comments, filed Mar. 28, 2005; Public Service Communications Comments, filed Mar. 28, 2005; Arctic Slope Telephone Association Cooperative, Inc. Comments, filed Mar. 28, 2005; Mid-Tex Cellular, Ltd Comments, filed Mar. 28, 2005; Great Lakes of Iowa, Inc Comments, filed Mar. 28, 2005.

carriers use their market power to demand asymmetric roaming rates from small and rural carriers.⁵⁵ Furthermore, in the pending roaming docket, through recent *ex partes*, small and rural carriers reiterate these concerns.⁵⁶

III. MEMORANDUM OPINION AND ORDER

18. We have reviewed the record received in WT Docket No. 00-193 in response to the *2000 CMRS Roaming NPRM*. Given continued advancements in technology and the current state of the CMRS market since adoption of the *2000 CMRS Roaming NPRM*, we find that the questions presented and the tentative conclusions made therein do not reflect the current CMRS marketplace and that the record in that proceeding has become stale. Of particular importance is that the record has become significantly outdated regarding the state of competition in the CMRS market and the impact of such competition on our consideration of the appropriate regulatory regime for roaming services. For example, in considering regulatory options for addressing roaming, the *2000 CMRS Roaming NPRM* relies upon the Commission's findings and conclusions in the Commission's August 2000 *Fifth Annual CMRS Competition Report*. Significantly, there have been four annual CMRS reports issued since that time, which have further tracked various industry developments in the provision of CMRS voice and data services. Also, the record in the *2000 CMRS Roaming* proceeding does not take into account the potential impact that recent mergers between CMRS providers could have on the future development and provision of roaming services. We believe that evaluation of these factors is necessary to develop an adequate record on whether current CMRS roaming requirements should be modified.

19. In this regard, we note that the Rural Telecommunications Group, Inc. (RTG) has petitioned the Commission to refresh the record in the *2000 CMRS Roaming* proceeding.⁵⁷ RTG cites "significant industry changes" as supporting its request for a "fresh look at competitive roaming conditions and their effect on customers in all regions of the nation, and most significantly, rural regions."⁵⁸ We concur with RTG that a fresh look at roaming is warranted because of the significant advancements in technology and other significant developments in the CMRS market that have occurred since 2000, including recent market consolidation. In light of these substantial developments, however, we believe that the best course of action is to terminate the old proceeding and initiate a Notice of Proposed Rulemaking in a new proceeding that takes the most current technological and market conditions into account and examines the potential impact of these conditions on our regulation of roaming. Therefore, we terminate WT Docket No. 00-193 by this Order.

IV. NOTICE OF PROPOSED RULEMAKING

20. In this Notice of Proposed Rulemaking (Notice), we initiate a new proceeding to reexamine the state of roaming in the CMRS marketplace and whether CMRS providers should be subject to roaming obligations. Accordingly, below, we discuss and seek comment on issues related to manual and automatic roaming, including issues concerning roaming negotiations, small and rural carrier concerns, and technical considerations.

⁵⁵ *Id.*

⁵⁶ See, e.g., RTG, WT Docket No. 00-193, *Ex Parte*, filed June 28, 2005; Leap Wireless, WT Docket No. 00-193, *Ex Parte*, filed July 12, 2005.

⁵⁷ See RTG Petition, WT Docket No. 00-193.

⁵⁸ RTG Petition, WT Docket No. 00-193, at 1-2. RTG suggests that market consolidation has created a "virtual duopoly" over each digital CMRS platform and notes that competitive roaming issues should be thoroughly examined on a nationwide and market-specific basis. *Id.* at 2.

A. Manual Roaming

21. In 1996, having determined that roaming was a critical element of CMRS service, the Commission found that, at a minimum, some form of a roaming rule was necessary as the broadband PCS networks were being built out. Accordingly, as discussed above, in the *Interconnection and Resale Obligations Second Report and Order* the Commission expanded the manual roaming requirement to broadband PCS and certain SMR providers so that subscribers with technically compatible handsets would be assured of being able to roam.⁵⁹

22. We now believe it is appropriate, in the context of this Notice, to reexamine the manual roaming requirement. We seek up-to-date information on the practice of manual roaming and the continued utility of the manual roaming rule. We are aware of at least two ways manual roaming is conducted. In its simplest form, a host system uses information sent by the roaming mobile unit during call setup to determine whether the unit is a subscriber in the market and, if not, routes the call to a third party for operator assistance, payment arrangements, and completing the call. In a more complex form, the host system uses the information to identify the unit's home carrier and determine whether that carrier has a roaming agreement in place with the host carrier. If no agreement exists, the host carrier routes the call to a third party as described above. In either case, roaming can only occur if the unit is technologically compatible with the host system.

23. We seek comment on how often subscribers avail themselves of manual roaming in either of its two forms or other forms, if available. In light of both the evolution of the CMRS market and advancements in CMRS technologies, to what extent has manual roaming fallen into disuse or been replaced by automatic roaming? Given the role of manual roaming in today's marketplace, we request comment regarding whether the manual roaming rule should be eliminated, either in combination with the promulgation of an automatic roaming rule or without such a rule. Alternatively, should the manual roaming rule be kept as a fallback for consumers when automatic roaming is unavailable? In recent merger orders, the Commission imposed a condition prohibiting the merged company from blocking manual roaming.⁶⁰ To what extent is home carrier blocking of manual roaming a problem? Is a rule change -- as opposed to merger conditions -- an appropriate way to address this issue? Commenters should address the extent to which the manual roaming rule actually promotes the goals the Commission sought to achieve in its 1996 *Interconnection and Resale Obligations Second Report and Order*, the nature and extent of any costs imposed by the manual roaming rule, and the relative weight of these costs and benefits.

24. In the *Interconnection and Resale Obligations Third NPRM* in 1996, the Commission stated its belief that once broadband PCS providers' buildout periods were completed, sufficient wireless capacity would be available that would likely render a manual roaming rule unnecessary and tentatively concluded that any roaming rule adopted should apply only for a transitional period.⁶¹ We seek comment on whether any manual roaming requirement that we retain or adopt in this proceeding should be subject to a sunset provision and, if so, when such a sunset should occur. We also inquire whether any sunset of the manual roaming rule should be contingent upon adoption of an automatic roaming rule.

⁵⁹ *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9470-71 ¶ 13, as affirmed in the *Manual Roaming Order on Reconsideration*, 15 FCC Rcd at 15976 ¶ 2, 15977-82 ¶¶ 6-21.

⁶⁰ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, FCC 05-138 at ¶ 108; *Sprint-Nextel Order*, FCC 05-148 at ¶ 127.

⁶¹ *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9479 ¶ 32.

B. Automatic Roaming

25. In the *Interconnection and Resale Obligations Third NPRM*, the Commission determined that taking any action on automatic roaming would be premature because the record was inconclusive. Since the record predated operation of emerging wireless services, e.g., 2.5G services offered using auctioned PCS licenses, it did not demonstrate the failure of the market to ensure the widespread availability of automatic roaming agreements.⁶² In the *2000 CMRS Roaming NPRM*, the Commission stated that it would not adopt any automatic roaming requirement unless it was clear that providers' current practices were unreasonably hindering the operation of the mobile telephony market to the detriment of consumers.⁶³ The *2000 CMRS Roaming NPRM* therefore sought comment on the availability of automatic roaming generally and on whether there is any evidence of unreasonable or discriminatory conduct.⁶⁴ Considering the lapse of time and change of technologies and markets since the release of the *2000 CMRS Roaming NPRM*, we now seek up-to-date information on automatic roaming that would enable the Commission to fully consider the question and reach an informed decision about whether to adopt an automatic roaming rule. Interested parties are invited to discuss in detail whether, in the absence of an automatic roaming requirement, there have been any CMRS industry changes and trends that have positively or negatively affected the availability of roaming to consumers.

26. We note that the majority of commenters on the *2000 CMRS Roaming NPRM* opposed the adoption of an automatic roaming rule, arguing that it would not be in the public interest to do so because it would result in rate increases, poorer quality of service, and fewer choices for consumers.⁶⁵ These commenters generally favored market-based solutions over regulatory mandates,⁶⁶ arguing that market forces were working and roaming agreements were generally available,⁶⁷ and claiming that an automatic roaming rule was unnecessary given the level of competition in the CMRS market.⁶⁸ Several commenters argued that an automatic rule would eliminate incentives for carriers to build out their networks.⁶⁹ Other commenters, however, supported the establishment of an automatic roaming rule.

⁶² *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9471-72 ¶¶ 15-16.

⁶³ *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21635-36 ¶ 18.

⁶⁴ *Id.*

⁶⁵ In WT Docket No. 00-193, Cingular argued that if the Commission were to adopt an automatic roaming requirement, the rule should require CMRS licensees to provide automatic roaming only to other facilities-based CMRS providers. See Cingular Comments at 11. Leap Wireless argued that its Cricket fixed-fee service plan, which offers unlimited local airtime with no roaming, is fundamentally incompatible with the imposition of an automatic roaming rule. See Leap Wireless Comments at 5-7.

⁶⁶ See, e.g., WT Docket No. 00-193: Nextel Comments at 2-4; Cingular Comments at 2-4, 6; Cellular Telecommunications & Internet Association ("CTIA") Comments at 2, 8; Qwest Corporation ("Qwest") Reply Comments at 3; National Telecommunications Cooperative Association ("NTCA") Comments at 4; RCA Comments at 3-4; Leap Wireless Comments at 4.

⁶⁷ See, e.g., WT Docket No. 00-193: CTIA Comments at 2; Qwest Reply Comments at 3; NTCA Comments at 4; Leap Wireless Comments at 4.

⁶⁸ See, e.g., WT Docket No. 00-193: Verizon Wireless Comments at 7-8; Nextel Comments at 2; Nextel Reply Comments at 2; RCA Comments at 3-4; USCC Comments at 1, 5; Leap Wireless Comments at 2, 7-8.

⁶⁹ See, e.g., WT Docket No. 00-193: CTIA Comments at 6-7; Nextel Comments at 8; Cingular Comments at 7. Cingular alleged that cellular and PCS carriers compete on the basis of coverage, rates, features, and roaming footprints and that PCS carriers want to use the automatic roaming rule to avoid the costs of build-out in rural areas where cellular carriers have already built out and eliminate coverage and roaming footprints as competitive factors vis-à-vis cellular carriers. Cingular Comments at 7-8. Thus, Cingular urged, an automatic roaming requirement would be a disincentive for certain carriers to build out since those carriers could rely on the superior coverage of their competitors. Cingular Comments at 9.

These commenters argued that the ability to roam is an important consideration to consumers and that a rule was necessary because the provision of roaming services was not competitive and suffered from increased concentration.⁷⁰ Moreover, even some opponents of an automatic roaming rule expressed concern about the potential for anti-competitive abuses and urged the Commission to maintain a close watch on roaming practices.⁷¹

27. We seek comment on how these arguments previously made in favor of and in opposition to adoption of an automatic roaming rule are affected by recent evolution of the CMRS marketplace. We are interested in the effects that the existing roaming environment has on U.S. consumers. For example, what effect has the existing roaming environment had on the availability, quality and price of services to consumers? Is there any disparate impact on consumers using services in rural areas? We seek comment on the availability of automatic roaming to consumers in the absence of an automatic roaming requirement. Are there instances in which providers refused to enter into automatic roaming agreements with other providers with compatible systems, or where they have discriminated with respect to the prices or other terms on which they make roaming agreements available to different carriers? We also seek comment on whether CMRS industry mergers could increase the incentive for large, nationwide carriers to deny automatic roaming agreements to their local or regional competitors. We note that in recent merger review proceedings, many parties raised important concerns about the current state of the roaming market, particularly in rural areas.⁷² We seek comment regarding evidence of discriminatory roaming practices on an industry-wide basis as well as on a market-specific basis. Commenters are invited to discuss the current availability of automatic roaming services in various regions with specific data, including the quality of services and the impact of roaming services on "dead spots" in many less populated areas.

28. Commenters should address both the potential benefits of various regulatory options and the potential costs. For example, would an automatic roaming rule create disincentives to the growth of facilities-based competition, or to the continued development of carriers with nationwide footprints? Would such a rule impede the development of new and improved roaming features? Are there new and improved roaming services that have developed over the past few years in the absence of an automatic roaming requirement? In addition, how would constraints imposed by any particular roaming rule affect the competitiveness of particular carriers? Would a nondiscrimination rule or any other automatic roaming rule thwart CMRS carriers' ability to compete vigorously on the basis of the particular roaming services provided, or otherwise impede carriers' ability to differentiate their roaming services? Would the costs of a rule impact small carriers disproportionately, such that some form of exemption for those carriers would be appropriate? We invite commenters to provide economic analysis and data regarding the potential benefits and costs of imposing an automatic roaming rule.

29. We also seek comment on any administrative costs that would arise from a non-discrimination requirement or other automatic roaming rule, were such a rule to be implemented. With respect to a potential non-discrimination requirement in particular, we seek comment on any burdens that would arise from the need to determine whether carriers seeking roaming agreements are "similarly situated."

⁷⁰ See, e.g., WT Docket No. 00-193: Corr Comments at 3-5; VoiceStream Reply Comments at 1, 3; Western Wireless Reply Comments at 2-3, 5; SLO Cellular Reply Comments at 1, 3; Southern Reply Comments at 4. See Pacific Wireless Technologies, Inc. ("Pacific") Comments at 2-3, 5-6; Pacific Reply Comments at 3.

⁷¹ See, e.g., WT Docket No. 00-193: NTCA Comments at 3-4; USCC Comments at 1-2, 7-8; USCC Reply Comments at 6-8; RCA Comments at 5-6; Sprint Comments at 1, 8-10; Sprint Reply Comments at 1.

⁷² See paras. 13-15, *supra*. See also paras. 17, *supra* and 38-43, *infra*.

30. We also seek comment on how to assess technical compatibility in an automatic roaming environment. Under the existing manual roaming rule, the subscriber seeking to roam must first possess a handset that is technically capable of accessing the roamed-on system.⁷³ Similarly, we believe that if an automatic roaming requirement were imposed, the carrier seeking to enable its subscribers to roam on another system should have the burden of developing and implementing any technology that is necessary to achieve that result. In addition, we believe that any automatic roaming rule should be sufficiently flexible to permit a carrier to change its system for legitimate business reasons (e.g., increasing capacity, spectrum efficiency, fraud control, or deployment of enhanced features) without any obligation to make its system accessible to roamers. At the same time it may be necessary within such a framework to adopt certain safeguards to ensure that a carrier takes reasonable actions to facilitate another carrier's efforts to achieve the capability to access its system. Commenters should address whether and to what extent a carrier should be obligated to facilitate another carrier's efforts to access its system. We invite comment on the possible design of a rule to balance these considerations, as well as on any other possible approaches.

31. In addition, we seek comment on whether carriers currently use any method to inform their subscribers about when they are roaming on another carrier's network and on whether the subscriber may incur additional charges as a result of such roaming. We invite comment on industry practices relating to consumer education about roaming. Further, we seek comment on any other issue that a commenter believes is important for the Commission to consider as we determine whether it would be in the public interest to impose an automatic roaming requirement on CMRS providers, including, for example, any concerns regarding subscriber privacy or carriers' control over proprietary information and whether any automatic roaming requirement that we adopt in this proceeding should be subject to a sunset provision and, if so, when such a sunset should occur.⁷⁴

32. Against this backdrop, below we further discuss and seek comments on automatic roaming agreements, issues raised by small and rural carriers, and technical developments.

1. Roaming Agreements

33. In the *Interconnection and Resale Obligations Third NPRM* as well as in the *2000 CMRS Roaming NPRM*, the Commission suggested that one possible automatic roaming rule could require, as a condition of license, that covered providers that enter into roaming agreements with other such providers make like agreements available to similarly situated providers, where technically compatible handsets are being used, under non-discriminatory rates, terms, and conditions.⁷⁵ Such a rule could prevent established carriers from entering into favorable agreements with selected providers while unreasonably denying such agreements to similarly situated carriers.⁷⁶ We seek comment on whether an anti-discrimination approach

⁷³ See *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9470 ¶ 13.

⁷⁴ We note that when issuing the *Interconnection and Resale Obligations Third NPRM* in 1996, the Commission tentatively concluded that any roaming rule adopted, whether manual or automatic, should apply only for a transitional period. See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9479 ¶ 32.

⁷⁵ *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9475 ¶ 22.

⁷⁶ Several commenters in CC Docket No. 94-54 contended that, given the complex factors that are part of negotiations and determine the nature of any particular automatic roaming arrangement between any two carriers, carriers are rarely (if ever) "similarly situated." See, e.g., CTIA *Interconnection and Resale Obligations Third NPRM* Comments at 15 and Reply Comments at 5-7; Rural Cellular Association (RCA) *Interconnection and Resale Obligations Third NPRM* Comments at 4.

to automatic roaming is appropriate in the current marketplace, or whether any other approaches should be considered.

34. To the extent that a CMRS provider engages in unreasonable and discriminatory behavior by refusing to enter an automatic roaming agreement, we also seek comment on the adequacy of remedies under existing law, such as the means permitted under Sections 201, 202, 208, 251, and 332 of the Act.⁷⁷ We seek general comment on whether the avenues of complaint and redress afforded by these sections provide sufficient and appropriate means of ensuring the development of automatic roaming services in a competitive CMRS market, or whether an automatic roaming requirement is necessary in order to serve the public interest.

35. Assuming that adoption of additional protections against discrimination is needed, we seek comment on whether an anti-discrimination approach to roaming should be examined on a nationwide or on a market-specific basis.⁷⁸ Should any automatic roaming rule require a carrier to enter an automatic roaming arrangement on a nondiscriminatory basis with a facilities-based competitor in the same market ("in-market" roaming)?⁷⁹ For instance, do such agreements diminish carriers' incentives for building out their networks? We seek comment on how an exception that permits carriers to deny roaming agreements to "in-market" competitors could be administered, given the different geographic scope of cellular, broadband PCS, and SMR licenses.

36. Similarly, we seek comment on whether providers should be permitted to offer roaming agreements to affiliates on different terms and conditions than to non-affiliates, or whether, instead, agreements favorable to affiliates constitute unreasonable, discriminatory behavior. We seek comment on whether it would serve the public interest to require carriers to make roaming service available to other carriers in one-way agreements under the same terms and conditions as under reciprocal agreements. We also request comment on whether a carrier should be able to offer a lower rate to a geographically proximate carrier. In addition, we request comment on to what extent, if any, an automatic roaming rule should encompass requirements specifically affecting resellers, and on the costs and benefits of any such requirements. We invite commenters to provide economic analysis and data supporting their positions.

37. Finally, as stated above, in the proceeding addressing the Sprint-Nextel merger, SouthernLINC Wireless contends that it has been unable to negotiate a satisfactory roaming agreement with Nextel because the agreement restricts its subscribers to basic interconnected voice roaming and denies them access to push-to-talk, dispatch, or data roaming services.⁸⁰ We seek comment on whether such denial of access to roaming services harms competition or consumers and, if so, how any automatic roaming rule should be crafted to address the issue. For example, should an automatic roaming rule require carriers to permit roaming access to all technical features of their systems, and/or require carriers to make the same features accessible to all of their roaming partners on a non-discriminatory basis? We invite commenters to provide economic and technical analysis and data supporting their positions,

⁷⁷ Several commenters in CC Docket No. 94-54 contended that existing remedies were sufficient. *See, e.g., Bell Atlantic Interconnection and Resale Obligations Third NPRM Comments at 7-8; RTG Interconnection and Resale Obligations Third NPRM Comments at 4.*

⁷⁸ *See* RTG, WT Docket No. 00-193, *Ex Parte*, filed Feb. 9, 2005, at 2.

⁷⁹ Several commenters in CC Docket No. 94-54 argued in favor of such a requirement. *See, e.g., AT&T Wireless Public Notice Comments at 6-8, 10 and Reply Comments at 5; Sprint Spectrum, L.P. d/b/a Sprint PCS Public Notice Comments at 2, 5-7.* Others opposed such a requirement. *See, e.g., BellSouth Corporation Public Notice Reply Comments at 5-6; Centennial Cellular Corporation Public Notice Reply Comments at 4-5.*

⁸⁰ SouthernLINC Wireless Reply Comments, WT Docket No. 05-63, at 5-6. *See also* ¶ 15, *supra*.

including information on how common practices such as those alleged by SouthernLINC are within the industry.

2. Small and Rural Carrier Concerns

38. In various Commission proceedings, small and rural wireless service providers have asserted that CMRS industry mergers have significantly reduced their nationwide roaming options.⁸¹ With a reduced number of nationwide roaming partners available, small and rural carriers are concerned that the remaining nationwide carriers will be able to use increased market power to adversely affect roaming negotiations in the future. These carriers contend that the large nationwide service providers are able to exercise market power through an advantageous bargaining position that affects not just the ability of small and rural carriers to enter into roaming agreements, but the terms of such agreements.⁸² Small and rural carriers also claim that numerous incompatible technologies further reduce their bargaining power.⁸³

39. Additionally, small and rural carriers assert that the amount of roaming traffic they exchange with other carriers has been significantly reduced as the large carriers enter into roaming agreements with other larger carriers and avoid roaming on smaller carriers' networks.⁸⁴ These small carriers believe such behavior is indicative of a larger industry trend where the larger carriers have begun to favor each other to the exclusion of smaller competitors, ignoring high cost rural areas. These carriers state that a substantial portion of their revenue comes from roaming revenue and the loss of such revenue makes it difficult for them to remain viable. They assert that favorable deals between large carriers eliminate a vital source of revenue for small and rural carriers.⁸⁵ Furthermore, small carriers contend that the large carriers' practice of negotiating favorable roaming deals with one another constitutes unreasonable discrimination in violation of Section 202 of the Communications Act.⁸⁶

⁸¹ See, e.g., WT Docket No. 05-71 (*Tenth Annual CMRS Competition Report*): Leaco Rural Telephone Cooperative, Inc. Comments, filed Mar. 28, 2005; Public Service Communications Comments, filed Mar. 28, 2005; Arctic Slope Telephone Association Cooperative, Inc. Comments, filed Mar. 28, 2005; Mid-Tex Cellular, Ltd Comments, filed Mar. 28, 2005; Great Lakes of Iowa, Inc Comments, filed Mar. 28, 2005; RTG Petition, WT Docket No. 00-193, filed Nov. 1, 2004.

⁸² See WT Docket No. 00-193: NTCA Comments at 4-6; SLO Cellular Reply Comments at 2; Corr Comments at 3-4, 7; Western Wireless Reply Comments at 5-7; RCA Comments at 5. For example, although opposed to an automatic roaming rule, NTCA contended in its 2001 comments that rural carriers pay more for their customers to roam in urban areas than the large carriers pay for their subscribers to roam in rural areas because of relative demand, i.e., the ability to roam in the rural areas is less valuable to urban customers than the ability to roam in the urban areas is to rural customers. As a result, NTCA argued, small carriers lack the leverage to negotiate better roaming terms since they would lose subscribers without a roaming agreement. See NTCA Comments at 6. Other alleged types of anti-competitive behavior by large carriers included failure to respond to a request to initiate roaming negotiations, refusal to enter an agreement unless the large carrier's customers receive discriminatory, favorable treatment, and offering discriminatory rates to rural carriers. See NTCA Comments at 6; RCA Comments at 5; VoiceStream Reply Comments at 3; Corr Comments at 3-4, 7.

⁸³ See WT Docket No. 00-193: Western Wireless Reply Comments at 4-5; SLO Cellular Reply Comments at 2, 4.

⁸⁴ See WT Docket No. 05-71 (*Tenth Annual CMRS Competition Report*): Leaco Rural Telephone Cooperative, Inc. Comments, filed Mar. 28, 2005; Public Service Communications Comments, filed Mar. 28, 2005; Arctic Slope Telephone Association Cooperative, Inc. Comments, filed Mar. 28, 2005; Mid-Tex Cellular, Ltd Comments, filed Mar. 28, 2005; Great Lakes of Iowa, Inc Comments, filed Mar. 28, 2005.

⁸⁵ *Id.*

⁸⁶ *Id.*

40. Small and rural carriers also assert that with industry consolidation, large carriers behave in an anti-competitive manner with respect to roaming. For example, RTG contends that consolidation has allowed large, nationwide CMRS carriers to use their increased market power to demand asymmetrical roaming rates from small, rural carriers. In certain cases, RTG asserts, rural carriers must pay over five times as much to allow their customers to roam on nationwide carrier networks as the nationwide carriers pay for their customers to roam on rural networks.⁸⁷ RTG argues that these asymmetrical roaming rates harm rural consumers and prevent small and rural carriers from offering their rural subscribers viable nationwide service plans that would allow rural subscribers to roam on nationwide carriers' networks.⁸⁸

41. We seek comment on the concerns raised by small and rural carriers. We invite commenters to submit economic analysis and data regarding evidence of discriminatory or non-discriminatory roaming practices on an industry-wide basis, and the impact of such practices on consumers. If roaming rates are declining among carriers, is this due to a more robust CMRS market or, as small and rural carriers claim, from the dwindling number of nationwide carriers favoring one another in roaming agreements to the exclusion of other carriers? We seek specific evidence of wireless providers denying roaming agreements to other providers in a manner that harms consumers. We also seek comment on and evidence of whether large, nationwide carriers are preferring one another over other carriers in roaming agreements, and whether such a preference is a violation of Section 202 of the Communications Act.

42. In addition, we seek comment on whether large, nationwide carriers are engaging in the practice of barring their subscribers' access to networks operated by other carriers. If so, does this type of practice violate the spirit of our rule requiring carriers to provide roaming access by preventing subscribers from utilizing such a service?⁸⁹ We seek comment on the assertion by small and rural carriers that large carriers are using their market power to develop one-sided roaming agreements, at terms more favorable to themselves. Should the Commission require nondiscriminatory, rather than one-sided, automatic roaming arrangements?⁹⁰ In this regard, should large or nationwide carriers be required to make their networks available to all roaming partners on the same terms and conditions as they offer to their "most-favored" roaming partners. Finally, we seek comment on whether large, nationwide carriers control "bottleneck" facilities that impact the ability of customers to roam onto or off of small and rural wireless networks.

43. We also seek comment on whether the concerns raised by small and rural carriers should be examined on a regional or local basis. We note that RTG has proposed "an automatic roaming mandate" that would only be applicable to small and "rural" markets where roaming partner options are at a minimum.⁹¹ RTG has also suggested in a recent *ex parte* presentation that the Commission consider a "Tier IV" category of CMRS providers that would consist solely of CMRS carriers with 100,000 customers or less.⁹² Under this proposal, Tier IV providers would be entitled to automatic roaming in rural markets with large, nationwide carriers at reasonable symmetrical rates as a "check" against the

⁸⁷ See RTG, WT Docket No. 00-193, *Ex Parte*, filed June 28, 2005.

⁸⁸ *Id.* See also Leap Wireless, WT Docket No. 00-193, *Ex Parte*, filed July 12, 2005.

⁸⁹ See 47 C.F.R. § 20.12(c). We note that the Commission imposed merger conditions prohibiting this practice. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; see also *ALLTEL-WWC Order*, FCC 05-138 at ¶ 108; *Sprint-Nextel Order*, FCC 05-148 at ¶ 127.

⁹⁰ See paras. 33-36, *supra*.

⁹¹ RTG, WT Docket No. 00-193, *Ex Parte*, filed June 28, 2005, at 1.

⁹² *Id.*

abuse of market power by large carriers where they dominate the market.⁹³ We seek comment on RTG's proposal. Should the Commission consider an automatic roaming requirement specifically targeted to rural markets? If so, how should we define "rural" for this purpose? In the *Rural Report and Order*, the Commission established a baseline definition of "rural area" as "those counties (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data"⁹⁴ We seek comment on whether the definition in the *Rural Report and Order* or any other definition would be appropriate for any automatic roaming obligations contemplated in this proceeding.

3. Technical Considerations

44. *Roaming on Enhanced Digital Networks.* Another consideration in determining the need for and design of any automatic roaming requirement is the recent development by carriers of enhanced digital networks. Until recently, carriers' networks consisted primarily of second generation or "2G" digital technology, which provided voice and limited data service. Over the past two or three years, however, both large and small carriers have begun to upgrade their networks to 2.5G and "3G" technologies in order to provide for higher capacity and higher speed communications to their customers.⁹⁵ If the Commission were to apply some form of automatic roaming requirement to 2G systems, we seek comment on whether it should also apply to upgraded 2.5G or 3G systems as well.

45. To upgrade their networks with additional hardware and software, carriers obtain financing and incur costs. A competitive market usually encourages carriers to incur these costs to bring the latest and most modern communications options to their subscribers. We seek comment on what impact an automatic roaming requirement would have on the incentive of carriers to invest in such upgrades. We also seek comment on whether a carrier that has upgraded its system should be required to enter into roaming agreements only with other carriers that have similarly upgraded their systems, or whether, alternatively, we should require a carrier with 2.5 and 3G capabilities to enter into automatic roaming agreements with all or some subset of carriers (*e.g.*, rural carriers) that employ the same digital technology (*e.g.*, GSM or CDMA), even if the other carriers have not upgraded their systems.

46. We also seek comment on the effect that automatic roaming would have on the capacity of 2.5 and 3G networks and the ability of carriers to offer full access to their own customers. We would be concerned if requiring a carrier to offer roaming service on its enhanced network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers. We therefore ask whether a carrier should have the right to limit access to its network by roamers, and what parameters should be considered as justification for such limits. We invite commenters to suggest specific standards for determining when the requirement should or should not apply.

47. *Roaming with Multi-Mode Handsets.* Another technical consideration in the context of roaming is that, in order for roaming on digital networks to be successful, a customer must have a handset

⁹³ *Id.*

⁹⁴ See *Facilitating the Provisions of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, 19087 at ¶ 11 (2004).

⁹⁵ In addition to providing more voice calling capacity, such upgrades enable carriers to provide various services, such as text messaging, Internet downloads, video transmissions, and e-mail communications. The GSM carriers are upgrading their networks to include General Packet Radio Services (GPRS) and Enhanced Data Rates for GSM Evolution (EDGE) technologies, and CDMA carriers are upgrading their networks to include CDMA2000 1xRTT technology. In the future, GSM carriers will employ Wideband CDMA and CDMA carriers will employ Evolution Data Only (EV-DO) and Evolution-Data and Voice (EV-DV) systems to provide even greater enhancements to their networks. See *Ninth Annual CMRS Competition Report*, 19 FCC Rcd at 20650 ¶¶ 128-29.

that employs the same digital standard (e.g., GSM or CDMA) as the carrier on whose network the customer is roaming. Thus, a carrier that uses GSM would not be expected to enter into an agreement with a carrier that uses CDMA, because the customers of each carrier would not be able to access the other carrier's network. This, of course, limits the number of carriers in a given geographic area that can enter into roaming agreements. However, if, in the future, handsets become available that employ multiple digital technologies or software-defined radio capabilities, this may reduce or eliminate technical impediments to the subscribers of any carrier roaming on any other carrier's network. We seek comment as to whether and how soon such technology developments may occur, and if so, what effect the availability of multi-technology handsets will have on carriers' roaming options (e.g., if multi-technology handsets were available, should we require carriers using CDMA technologies to enter into roaming agreements with GSM carriers)?

48. *Roaming on Analog Networks:* In 2002, the Commission established February 18, 2008 as the sunset date for the requirement that cellular carriers provide analog service.⁹⁶ In light of the pending sunset of the analog requirement, we seek comment on whether it is necessary to extend any automatic roaming obligation that we might adopt to analog networks. We seek comment on the extent to which analog systems are used in roaming today and whether there is a need to adopt automatic roaming for analog.

49. Also, we note that in the *Cingular-AT&T Wireless Order*, the Commission considered the possible effect of that merger on the roaming market for those wireless telephony consumers who rely on analog service.⁹⁷ We seek comment on the extent to which roaming options will be affected once the analog requirement no longer exists.⁹⁸ This information is relevant to better assess the state of the CMRS market and whether analog sunset will affect the market conditions, in the near future, in a manner that would justify adoption of an automatic roaming rule for digital networks. Commenters should comment on this change and other technical changes and their possible effects on the roaming markets.

⁹⁶ In 2002, the Commission found that it was in the public interest to no longer require carriers to continue to provide analog service after February 18, 2008. See Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, WT Docket No. 01-108, 18 FCC Rcd 490 ¶ 22 (2002) (“2000 Biennial Review R & O”). The 5-year sunset period is based on the publication of the 2000 Biennial Review R & O in the Federal Register. See Public Mobile Services and Personal Communications Services, WT Docket No. 01-108, Final Rule, 67 Fed Reg 77175-01 (Dec. 17, 2002); see also 47 C.F.R. § 22.901(b).

⁹⁷ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21590 ¶ 178; see also *ALLTEL-WWC Order*, FCC 05-138 at ¶ 104.

⁹⁸ For example, a small cellular GSM carrier might now enter into a roaming agreement with a nationwide cellular CDMA carrier operating in its area because both provide analog service. However, when the analog requirement terminates, the nationwide carrier would only be able to enter into a roaming agreement with a small CDMA carrier in the area – if one exists – and the GSM carrier would only be able to have a roaming agreement with a nationwide GSM carrier – if one exists in the area.

V. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

50. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.⁹⁹

B. Initial Regulatory Flexibility Analysis

51. As required by the Regulatory Flexibility Act,¹⁰⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice of Proposed Rulemaking as set forth below in subsection D, and have a separate and distinct heading designating them as responses to the IRFA.

C. Initial Paperwork Reduction Act of 1995 Analysis

52. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.¹⁰¹

D. Comment Period and Procedures

53. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.¹⁰²

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <<http://www.fcc.gov/cgb/ecfs/>> or the Federal eRulemaking Portal: <<http://www.regulations.gov>>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to <ecfs@fcc.gov>, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

⁹⁹ See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.2306(a).

¹⁰⁰ See 5 U.S.C. § 603.

¹⁰¹ See 44 U.S.C. 3506(c)(4).

¹⁰² See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to <fcc504@fcc.gov> or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

E. Further Information

54. For further information concerning this rulemaking proceeding contact: Eli Johnson at (202) 418-1395, <Eli.Johnson@fcc.gov>, or Won Kim (202) 418-1368, <Won.Kim@fcc.gov>, Wireless Telecommunications Bureau, Spectrum and Competition Policy Division.

VI. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 201(b), 251(a), 253, 303(r), and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), 251(a), 253, 303(r), and 332(c)(1)(B), and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412, this Memorandum Opinion & Order and Notice of Proposed Rulemaking IS ADOPTED.

56. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 201(b), 251(a), 253, 303(r) and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 251(a), 253, 303(r) and 332(c)(1)(B), and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412, the automatic and manual roaming rulemaking proceeding in WT Docket No. 00-193 IS TERMINATED.

57. IT IS FURTHER ORDERED that the Petition for Commission Action filed by the Rural Telecommunications Group, Inc. on November 1, 2004 IS GRANTED, to the extent described above.

58. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in this Notice of Proposed Rulemaking, and that comment is sought on these proposals.

59. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX**Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in paragraph 53, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the RFA.² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for and Objectives of the Proposed Rules

In the Memorandum Opinion and Order (MO&O) and Notice, the Commission terminates the open proceeding relating to the automatic and manual roaming obligations of Commercial Mobile Radio Services (CMRS) providers in WT Docket No. 00-193, and initiates a new proceeding to examine whether its current rules regarding roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market. In the MO&O portion of the item, the Commission terminates its previous consideration of roaming issues in WT Docket No. 00-193, primarily on the basis that the comments filed and the matters at issue therein are now stale due to the passage of time and other regulatory and industry changes that have occurred since its commencement. As a result, the Commission decides to terminate the proceeding without the adoption of rules. The Commission also decides to initiate a Notice in a new proceeding to examine CMRS roaming in a manner that takes into account current technological and market conditions. The Commission's decision will allow it to develop a record with up-to-date information regarding the state of today's CMRS marketplace in an effort to determine whether there is a need for a regulatory regime for roaming services.

Specifically, in the Notice, the Commission seeks to establish a record on the current state of manual roaming and whether there is a continuing need for a manual roaming rule. The Commission also seeks comment on whether carriers should be required to enter into agreements to allow automatic roaming on their networks and, if so, how such a rule should be designed, to whom should it apply, and for what period of time. Furthermore, the Commission requests comment on whether national carriers are negotiating roaming agreements with small or rural carriers in an anti-competitive manner or are simply avoiding their networks altogether and, if so, whether the Commission should establish an automatic roaming rule that applies to a specific market or type of carrier and for what period of time. Finally, the Commission seeks to establish a record on whether digital network and handset technology has advanced enough that there are no longer technical limitations affecting the likely provision of roaming.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 1045-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 603(a).

³ *Id.*

B. Legal Basis

The potential actions on which comment is sought in this Notice would be authorized under sections 1, 4(i), 201(b), 251(a), 253, 303(r), and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), 251(a), 253, 303(r), and 332(c)(1)(B).

C. Description and Estimate of the Small Entities Subject to the Rules

The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁴ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁷

To assist the Commission in its analysis, commenters are requested to provide information regarding which CMRS entities would be affected by the regulations on which the Commission seeks comment in this Notice. In particular, we seek estimates of how many small entities might be affected.

The possible sunset of the existing “manual” roaming rule, if adopted, would eliminate the requirement that covered cellular, broadband PCS and SMR carriers make service available to individual users upon request, so long as the roamer’s handset is technically capable of accessing their services. Sunsetting of this rule would be expected to reduce the existing regulatory burden, if any, on small businesses that must comply with the requirements of the “manual” roaming rule.

The “automatic” roaming regulations on which the Commission seeks comment, if adopted, would apply to providers of cellular, broadband PCS, and SMR services that offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.

Estimate for Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”⁸ Under that SBA category, a business is small if it has 1,500 or fewer employees.⁹ According to the Bureau of the Census, only twelve firms out of a total of 1,238 cellular and other wireless telecommunications firms operating

⁴ 5 U.S.C. § 605(b).

⁵ 5 U.S.C. § 601(6).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷ Small Business Act, 15 U.S.C. § 632.

⁸ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

⁹ *Id.*

during 1997 had 1,000 or more employees.¹⁰ Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

In addition, we can assess data provided annually to the Commission by Telecommunications Relay Service (TRS) carriers. The TRS data compilation, published in the Commission's *Trends in Telephone Service*, groups together cellular, personal communications services, and specialized mobile radio telephony carriers into a single category called "Wireless Telephony." As noted above, under the pertinent SBA small business size standard, a wireless business is small if it has 1,500 or fewer employees.¹¹ According to *Trends in Telephone Service* data, 447 carriers have reported that they provide Wireless Telephony.¹² Of that total, an estimated 245 are small providers, under the SBA size standard. Thus, we can estimate that the majority of such businesses are small.

Additionally, any rules adopted pursuant to this rulemaking will apply to cellular licensees only if they offer real-time, two-way switched voice or data service that is interconnected with the public switched network and that utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Although the Commission does not have definitive information, we estimate that most or all small business cellular licensees offer services meeting this description.

Estimate for Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹³ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁴ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁵ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁶ On March 23, 1999, the

¹⁰ U.S. Census Bureau, 1997 Economic Census, Information – Subject Series, Establishment and Firm Size, Table 5 (Employment Size of Firms Subject to Federal Income Tax), NAICS code 517212 (2002). The Census Bureau will be issuing 2002 Economic Census data relating to telecommunications entities in late 2004.

¹¹ 13 C.F.R. § 121.201, NAICS code 517212.

¹² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (May 2004). This source uses data that are current as of October 22, 2003.

¹³ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

¹⁴ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

¹⁵ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁶ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

Commission reauctoned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.¹⁷

Any rule modifications that will be made pursuant to this proceeding will apply to broadband PCS licensees only if they offer real-time, two-way switched voice or data service that is interconnected with the public switched network and that utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Although the Commission does not have definitive information, we estimate that most or all small business broadband PCS licensees offer services meeting this description.

Estimate for SMR Licensees. The Commission awards "small entity" bidding credits in auctions for SMR geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.¹⁸ The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.¹⁹ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²⁰ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²¹

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million.²² One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

¹⁷ See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

¹⁸ 47 C.F.R. § 90.814(b)(1).

¹⁹ *Id.*

²⁰ See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²¹ See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²² These incumbent entities, which were not subject to auctions, may also be assessed under the SBA's generic small business size standard for this category which is 1,500 or few employees.

Additionally, any rules adopted pursuant to this rulemaking will apply to SMR licensees only if they offer real-time, two-way switched voice or data service that is interconnected with the public switched network and that utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Although the Commission does not have definitive information, we estimate that many small business SMR licensees do not offer services meeting this description. Nonetheless, in the absence of definitive information, we assume that all of the Commission's SMR licensees that are small businesses may be subject to any rules that may be adopted in this proceeding.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The Commission anticipates that any rules that may be adopted pursuant to this Notice will impose at most only limited reporting or recordkeeping requirements. The only compliance costs likely to be incurred are administrative costs to ensure that an entity's practices are in compliance with the rule. The only compliance requirement of any possible new rules is that licensees subject to any automatic roaming requirement (*i.e.*, cellular licenses, broadband PCS licensees, and geographic area 800 MHz and 900 MHz SMR licensees that offer real-time, two-way, interconnected switched voice and data service) will need to provide non-discriminatory access to their wireless systems via automatic roaming once they reach an agreement with any carrier to permit automatic roaming. As noted above in this IRFA and in the text of the Notice, the Commission seeks comment on the potential costs of implementing an automatic roaming requirement in this context, including such potential costs on small business.²³

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁴

As noted, the possible sunset of the manual roaming rule, if adopted, would be expected to reduce any existing economic impact on small business. Therefore, the only possible negative economic impacts that might arise from this Notice are those what would be associated with an "automatic" roaming rule.

However, as discussed in the Notice, small and rural wireless service providers have requested that the Commission adopt an automatic roaming rule in some form. Small and rural service providers assert that CMRS industry mergers have significantly reduced their nationwide roaming options. With a reduced number of nationwide roaming partners available, small and rural carriers are concerned that the remaining nationwide carriers will be able to use increased market power to adversely affect roaming negotiations in the future. These carriers contend that the large nationwide service providers are able to exercise market power through an advantageous bargaining position that affects not just the ability of small and rural carriers to enter into roaming agreements, but the terms of such agreements. Small and rural carriers also claim that numerous incompatible technologies further reduce their bargaining power.

²³ See Notice at ¶¶ 28, 38-43.

²⁴ 5 U.S.C. § 603(c).

Additionally, small and rural carriers assert that the amount of roaming traffic they exchange with other carriers has been significantly reduced as the large carriers enter into roaming agreements with other larger carriers and avoid roaming on smaller carriers' networks. These small carriers believe such behavior is indicative of a larger industry trend where the larger carriers have begun to favor each other to the exclusion of smaller competitors, ignoring high cost rural areas. These carriers state that a substantial portion of their revenue comes from roaming revenue and the loss of such revenue makes it difficult for them to remain viable. They assert that favorable deals between large carriers eliminate a vital source of revenue for small and rural carriers. Furthermore, small carriers contend that the large carriers' practice of negotiating favorable roaming deals with one another constitutes unreasonable discrimination in violation of Section 202 of the Communications Act.

Small and rural carriers also assert that with industry consolidation, large carriers behave in an anti-competitive manner with respect to roaming. They contend that consolidation has allowed large, nationwide CMRS carriers to use their increased market power to demand asymmetrical roaming rates from small, rural carriers. In certain cases, they assert, rural carriers must pay over five times as much to allow their customers to roam on nationwide carrier networks as the nationwide carriers pay for their customers to roam on rural networks. They argue that these asymmetrical roaming rates harm rural consumers and prevent small and rural carriers from offering their rural subscribers viable nationwide service plans that would allow rural subscribers to roam on nationwide carriers' networks.

As a result of these assertions, the Commission seeks comment in the Notice on the concerns raised by small and rural carriers. The Commission asks commenters to submit economic analysis and data regarding evidence of discriminatory or non-discriminatory roaming practices on an industry-wide basis, and the impact of such practices on consumers. The Commission requests information on whether roaming rates are declining among carriers, and, if so, whether this is due to a more robust CMRS market or, as small and rural carriers claim, from the dwindling number of nationwide carriers favoring one another in roaming agreements to the exclusion of other carriers. The Commission seeks specific evidence of wireless providers denying roaming agreements to other providers in a manner that harms the providers or consumers. The Notice also seeks comment on and evidence of whether large, nationwide carriers are preferring one another over other carriers in roaming agreements, and whether such a preference is a violation of Section 202 of the Communications Act.

In addition, the Commission seeks comment on whether large, nationwide carriers are engaging in the practice of barring their subscribers' access to networks operated by other carriers. If so, the Commission asks, does this type of practice violate the spirit of its rule requiring carriers to provide roaming access by preventing subscribers from utilizing such a service? The Commission seeks comment on the assertion by small and rural carriers that large carriers are using their market power to develop one-sided roaming agreements, at terms more favorable to themselves. The Notice asks whether the Commission should require nondiscriminatory, rather than one-sided, automatic roaming arrangements. In this regard, the Notice asks whether large or nationwide carriers should be required to make their networks available to all roaming partners on the same terms and conditions as they offer to their "most-favored" roaming partners. Moreover, the Commission seeks comment on whether large, nationwide carriers control "bottleneck" facilities that impact the ability of customers to roam onto or off of small and rural wireless networks. Finally, the Commission also seeks comment on whether the concerns raised by small and rural carriers should be examined on a regional or local basis.

The Commission will draw on the information gained from comments filed in response to the Notice when considering whether an automatic roaming rule should be promulgated, and if so, how it can best be drafted to minimize any costs placed on small businesses. For instance, the Commission asks

whether the alternative of an exemption tailored for small business would be appropriate given the possible costs of an automatic roaming rule.²⁵

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

²⁵ See Notice at ¶ 28.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers; WT
Docket No. 05-265*

Consumers are using wireless phones more than ever. As we travel around town or around the country, we increasingly rely on wireless phones to stay connected with family, friends and colleagues. Sometimes we are assessed roaming charges to do so. Today we begin to explore the impact roaming charges have on the prices and services that we consumers get—and whether more rules are needed for roaming. We have expressly asked questions about the effects of roaming on consumers and the prices we pay; the practices that carriers use to inform us when we are roaming; the particular roaming experiences of rural consumers and carriers; and the treatment of data services as well as voice in the roaming context. I am grateful to my colleagues for their work in improving this item, and look forward to a full record on these issues. As we examine our regulatory approach to roaming, we should stay focused on the interests of consumers, especially those living in rural America.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers; WT
Docket No. 05-265*

Concerns about roaming have become more and more widespread over the past several years. Whether in the context of recent mergers or other rulemakings, we are hearing regularly from small and mid-size carriers who are becoming increasingly frustrated with their inability to negotiate automatic roaming agreements with larger regional and nationwide carriers for the full range of CMRS services. Not surprisingly, consolidation in the wireless industry over the past 12 months has only served to amplify existing concerns about the current state of roaming practices.

So I am very pleased we are initiating a proceeding that will explore all aspects of the issue of roaming and more specifically the effects of consolidation on the ability of smaller carriers to negotiate access to larger networks. While CMRS providers are subject to the common carrier provisions of Title II of the Act, including Sections 201 and 202, I support the item's request for comment on whether existing remedies under these provisions of the law have been sufficient to ensure the continued development of automatic roaming services.

I strongly encourage interested parties to provide as full and complete a record as possible in this proceeding. Unfortunately, it can sometimes be difficult to determine where the lines are between reasonable business practices and unreasonable discrimination, and we need to hear from industry on where these lines may fall. Parties concerned about roaming practices should supply us with as much detail as they can so that we truly are informed about the current status of roaming in the wireless industry.

Finally, I want to thank the Chairman and the Wireless Telecommunications Bureau for initiating this new proceeding so quickly. I was willing to delay a discussion of roaming issues in the context of recent mergers provided that we committed to get an industry-wide proceeding launched quickly. I fully support our item today because it responds to my concerns and is a positive and timely step forward to considering this important issue.